To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Al Richmond and Philip Marshall Connelly respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (Record 802) affirming the judgment of conviction herein of the District Court for the Southern District of California, Central Division.

PRELIMINARY STATEMENT.

Al Richmond and Philip Marshall Connelly are two of the fourteen defendants convicted below on a charge of conspiracy to violate Section II of the Smith Act. All of the convictions have been affirmed on appeal. Oleta O'Connor Yates and ten others of the said defendants have filed herein their petition for certiorari.

Petitioners Richmond and Connelly have selected their own separate counsel and proceeded separately because the principal activities leading to their conviction have been those of editors of a newspaper, thus raising sharply questions of freedom of the press which petitioners believe can be best presented through a separate petition on their behalf.

However, certain portions of the Yates petition are equally applicable to petitioners here; and for the sake of brevity when such portions seem applicable, petitioners here will incorporate the same by reference rather than setting them out in full.

Also, petitioners here and petitioners in the Yates petition have, again for the sake of avoiding repetition, filed a joint appendix in connection with both petitions for writ of certiorari.

OPINIONS BELOW.

The opinions of the courts below are noted in the Yates petition and joint appendix.

JURISDICTION.

The jurisdictional statement contained in the Yates petition is incorporated herein by reference.

QUESTIONS PRESENTED.

1. Petitioners Richmond and Connelly hereby adopt by reference as if fully set forth at length the questions numbered "1", "2", "3", "4", "5", "6", "7", "8", and "9" presented in the Yates petition.

2. Petitioners were indicted for conspiring to violate Section 11 of the Smith Act by willfully advocating violent overthrow of the Government and by organizing a society, the Communist Party, that advocated violent overthrow; in so conspiring, so the indictment charged, petitioners had the specific intent of causing the forceful destruction of the Government as speedily as circumstances would permit.

At the trial the only showing as respects petitioners was (a) that they edited and circulated a Communist sponsored newspaper, the content of which at no time contained any advocacy of force and violence, and (b) that they attended and participated in meetings of the Communist Party, which meetings were not shown to have in any way involved advocacy of the proscribed doctrines.

The trial Court refused petitioners' motions for directed verdict of acquittal. The jury returned a verdict of guilty, and the judgment entered thereon was sustained by the Court of Appeals. Two questions thereby arise:

(1) Did the courts below properly construe and interpret 18 USC Section 371 (conspiring to commit an offense against the United States) and 18 USC 2385 (the Smith Act) in holding the above described activities of petitioners constitute an offense prohibited by the said statutes?

(2) If the said statutes were properly construed, does said construction and application to these petitioners constitute a violation of the first amendment's guarantees of a free press, speech and assembly; or of the due process guaranties of the fifth amendment?

STATUTES INVOLVED.

The pertinent provisions of the statutes involved are set forth in the Yates petition and the joint appendix and are incorporated herein by reference.

STATEMENT OF THE CASE.

As previously noted, petitioners Al Richmond and Philip Marshall Connelly were convicted below on a charge of conspiracy to violate Section II of the Smith Act. The petition of *Yates et al*, in addition to stating facts relating specifically to those petitioners, also states facts equally applicable to petitioners here. Repetition serving no useful purpose, petitioners here adopt such portions of the Statement of Facts contained in the Yates petition as are applicable generally to all petitioners including the petitioners here.

The evidence here can be separated into three sections: One relating to petitioner Al Richmond, another relating to petitioner Philip Marshall Connelly, and a third relating to a newspaper published by said petitioners.

Evidence as to Petitioner Al Richmond.

Petitioner Richmond, who had been Secretary for the Young Communist League of Philadelphia, joined the Communist Party in 1931 (A. 212).[1] He was not shown to have been an officer of the Party at any time. He attended various California Party State conferences (A. 250) and between 1946 and 1949 a number of State Board meetings (A. 223-231, 368). In 1950 Richmond spoke on recruiting at a West Oakland section luncheon where he was introduced as a representative of the State Commit-

[1]Each party filed printed appendices setting forth selected portions of the reporter's record. The appendix to appellants' brief was divided by subject matter into items with each item given a number. The appellants' appendix is referred to herein as "App. Item" followed by the number of the item and the page numbers in said appendix. The letter "A" refers to the appendix to appellee's brief.

tee of the Communist Party (A. 110-12). He was a member of a special committee to help develop preconvention discussions (Ex. 181, p. 1).[2] In 1951, as part of a preconvention discussion, he authored an article entitled "Strike Struggles—Some Key Conclusions" in which he said that "In each strike . . . the enemy of the worker is . . . the capitalist, particularly the big monopoly sections of capital that sets the tone and lays down policy of its entire class" (Ex. 191, p. 3: A. 100-101).

The above evidence illustrates that petitioner Richmond participated in various meetings of the Communist Party. It in no way illustrates, nor is there any other evidence to illustrate, that he ever advocated force and violence or ever proposed the proposition that the Communist Party should advocate force and violence, nor is there any evidence that he ever agreed with other defendants that such advocacy should take place. There is, moreover, no evidence that such advocacy ever took place at the meetings which petitioner Richmond attended. We pass now to a statement of the evidence relevant to his work in the newspaper field.

In 1932 Richmond became a member of the editorial board of *The Daily Worker* (A. 211-18). In 1938 he was selected by the National Committee of the Communist

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[2]The exhibits admitted into evidence exceeded 500 in number and included many full length books. The Court of Appeals pursuant to stipulation of the parties and its order based thereon considered the exhibits on appeal in their original form without printing or reproduction. Copies of the reporter's transcript were prepared by a process known as photo offset printing and these copies were by order of the Court of Appeals accepted as the reporter's record on appeal without further printing. The letter "R" refers to the photo offset copies.

Party to be the editor of *The People's World*, a position which he continued to hold at the time of the indictment. (Ex. 636, A. 10; 367; Ex. 650; A. 112-13; R. 8060-1.)

As editor, he "stressed the Leninist and Marxist approach to every issue in the paper" (R. 3953-4); sought to increase its circulation (A. 35; R. 1686-7 and 1817-2); and in 1949 accepted as just, criticism by the State Board of the Party that the paper had been guilty of white and anti-Mexican chauvinism and pledged to eradicate all vestiges thereof from the paper (Ex. 340; A. 575-5).

As a member of the Communist Party and as editor of the paper, he constantly sought to have the Party promote the paper. At a State convention in 1948 he spoke on "Use of the Press as a Key Political Weapon," confirmed a lack of circulation, and urged that the Party should take steps to increase circulation, to review the content and policy of the press and integrate this work with that of the Party in order to most satisfactorily reach the largest number of the people. In this connection he said:

> "We have been talking here about the fulfillment of the vanguard role of the Party, and the development of the independent role of the working class through a consistent application of the tactic of the united front from below. These are central tasks of our Party. And to fulfill these tasks, it is necessary to build our paper. . . . If we are engaged in a campaign—let us say, a campaign to defeat the Mundt Bill—then the circulation of our paper is not something we must do in addition to the campaign: it is something we must do to ensure the

success of the campaign. The paper must be seen as the instrument to help explain the issue to the masses of people, to help organize them in the struggle around that issue" (Ex. G. p. 7).

Evidence as to Philip Marshall Connelly.

Petitioner Connelly was first shown to have been a member of the Communist Party in 1938 (A. 344-6). As was the case with petitioner Richmond, there was absolutely no showing that petitioner Connelly had ever held any office in the Party.

Again, as was the case with Richmond, Connelly attended various Party meetings. None of these meetings, however, was shown to have in any way involved advocacy of force or violence or any discussion that the Party should so advocate. In 1938 he attended the Party caucus of delegates for a Newspaper Guild convention. While there he stated that he would support the caucus program concerning the adoption of resolutions (including one on the war in Spain and others which the witness did not recall at the time) and the election of a party controlled slate for the International Guild Executive Board at its convention (A. 344-5). In 1940 he attended a Los Angeles County committee meeting where the presidential campaign was discussed, including such slogans as "Don't Support the Imperialist War" and "Vote Communist". At this meeting he said that Communists could do a good job in building up sentiment against war and the war effort (A. 251-2).

At a party meeting in 1941 he called for support of a strike then in progress at North American Aviation,

Inc., and for opposition to the threat to bring in Government troops to end the strike (A. 252-3). In 1946 he attended a Party meeting honoring Elizabeth Gurly Flynn of the National Committee (A. 140-2). At a Party club meeting in 1947 he said he became a member because "it afforded him an opportunity for organization and direction in the struggle" and "the chance to develop leadership" and enabled him "to organize and direct the policies of the union in which he was active" (A. 329-31).

He was present at a meeting at which the question of the Party going underground was discussed (A. 329-32). There is no evidence here or elsewhere in the record that the purpose of going "underground" had any relationship to advocacy of force or violence. There was much evidence that the Party had gone "underground" in the past to protect its members from violence and other illegal acts, and that consideration was being given to going "underground," if the Party is declared illegal, so that it could have a means of regaining its legal status (App. 290, Item 76).

We come now to Petitioner Connelly's activities in connection with newspaper work. During 1949, 1950 and 1951 he was the Los Angeles editor of the *People's World* (A. 204-5, 294-5, 406; Ex. 76). Previously he had participated in efforts to obtain funds and subscriptions for the paper (A. 253-5).

The Character and Content of the "People's World".

The first issue of *The People's World*, published in 1938, describes it as one of a chain of daily papers "that will strike a telling blow against reaction and Fascism

and for Socialism" (Ex. 159, p. 4). Distribution of this newspaper, among both Party members and non-members, the securing of subscriptions to the paper, and in general the promotion of its circulation, were all official parts of the program of the Communist Party (A. 34; 234-35; 253-55). The Party conceived of its newspaper as a means for distributing its ideas, a means of discussing its policies, and also as a method of discussing and proposing political action (Ex. G., p. 7; A. 35, 37, 580-81). Not only were the ideas expressed in *The People's World* to be circulated among Party members, but also distribution of the paper to non-members was to be a means of influencing them towards agreement with the thoughts expressed therein (A. 387-88). As might be expected, the Party exerted control over both the content and the personnel of the paper. The policies to be pursued by the paper were regularly discussed at Party meetings. (Ex. 472; A. 5, 313-15.)

Petitioners edited this newspaper. As editors they were closely associated with its content and with those who discussed its content. As editors they must be held to have advocated what the paper advocated, and to have wished to convince those who read the paper of the ideas which it put forth. And, indeed, if the paper was in fact a vehicle for the advocacy of overthrow of the Government by force and violence, or if the paper was a vehicle for convincing others that such a doctrine was proper, then petitioners here certainly advocated that doctrine. Further, since the policies of the paper may be inferred to have been mutually agreed upon between petitioners and other defendants herein, if the paper

advocated overthrow of the Government by force, then there would be evidence that petitioners here were members of a conspiracy to so advocate. The mere fact, however, that petitioners here edited a newspaper which put forth ideas which were held by the Communist Party, the mere fact that they together with others agreed on the content of the newspaper, the mere fact that they and others sought to circulate the paper widely both among Party members and among non-Party members, all of these facts in themselves show nothing.

The significance of these faces must turn on what actually was put forth by the paper, what petitioners in editing the paper, in circulating the paper, in agreeing with others to edit, print and circulate the paper, what petitioners in participating in these activities and in agreeing to participate in these activities sought to accomplish. What this object was, can be determined only from examination of the contents of the paper itself. An examination of the paper's content demonstrated beyond any doubt that petitioners' activities in connection with the newspaper are entirely inconsistent with the theory that they advocated or agreed to advocate overthrow of the Government by force.

In total some 68 issues of *The People's World* were introduced into evidence, 10 by respondents[3] and 58 by petitioners.[4] There is not a single word in any issue

[3]Exs. 159, 159a, 375, 707, 709, 710, 714, 736a, 737 and 749.

[4]Exhibits D, AK, AL, AM, AN, AO, AP, AQ, DR, DU, DJ, DM, DN, DP, DS, DT, DX, DY, DZ, EY, EZ, FA, FB, FC, FD, FE, FF, FG, FM, GJ, GK, GL, GM, GA, GE, GN, GT, GY, GZ, HA, JM, JR, JS, KA, KD, KE, KF, KH, MG, MH, MI, MJ, MO, MP, MQ, MU, MV, MW, MX.

advocating or susceptible of being construed as advocating the violent overthrow of our Government. The respondent has never made any contention to the contrary,[5] and neither of the courts below stated or intimated that such advocacy could be inferred from any of *The People's World* exhibits. Indeed, an examination of the content of the paper illustrates that if the petitioners in their activities as newspaper editors, publishers and circulators were advocating anything, they were advocating activities which are not only consistent with the existence and growth of democratic forms of government, but which are in fact essential to the functioning of a democratic government. What then is to be found in the columns of *The People's World?*

Like any newspaper this one, too, published book reviews, motion picture, radio, TV and music criticisms, and also articles on various subjects including labor, history, art, sports, etc. Its columns, again like any other newspaper, carried discussions on the important news and issues of the day, national, state and local. Thus, as a matter of practice, in election campaigns *The People's World* urged the voters to turn out and exercise their franchise[6] and endorsed candidates, including those of the major parties.

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[5] In Volume II of the appendix filed by respondent in the Court of Appeals, setting forth the exhibits it relied on, there is not a single quotation from any issue of *The People's World*.

[6] In an editorial, it said, "To bring out the maximum vote to the polls is the big job now left to every individual progressive, to every progressive organization. . . . It is an axiom of politics that the larger the total vote the better the chances of progressive candidates." (Ex. AP.)

It urged support of some propositions on the ballot, e.g., veterans' tax exemption, and it opposed others, including those which imposed restrictions on eligibility of voters and on the right of initiative under California law. (A. Item 22 pp. 131-33; Ex. A., Al., Am., An., Ap.) *The People's World* proposed campaigns to induce Congress and other legislative bodies to effectuate the legislative program which it supported.[7] In 1945 a "special legislative supplement" of the paper was issued in which was discussed the need for post-war governmental planning in the economic area.[8]

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[7]For example, with respect to Taft-Hartley repeal it said, "The law can be repealed. But it is going to take a terrific legislative battle, all the pressure and energy of the entire Labor movement working in unison." (Ex. AQ, App. Item 22, p. 132.)

[8]"Real post-war planning requires that the State government appropriate adequate funds for low-cost housing; for more schools and hospitals, especially in the rural areas; for State aid to cities and rural communities for public development projects and essential municipal services. It requires plans for reconversion of California's war industries to peacetime production, which must be fitted into national reconversion plans. It requires that we support our national policy, domestic and foreign, and a United Nations policy, which would guarantee the world markets upon which our domestic prosperity depends. And it demands first of all that we support the policies of President Roosevelt for national unity and a speedy victory."

In addition the paper advocated the appropriation of additional funds for child-care centers, educational facilities, state aid to returning veterans and for more adequate "enforcement machinery for price control and rationing, and to stamp out the black market". Equal pay for women, FEPC, increased old age pensions, the 18-year vote, and a committee on industrial relations were typical of its other legislative proposals. (Ex. DX, App. Item 25, pp. 138-142.) Among the other measures advocated were the Wagner-Dingell-Murray Health Bill (Ex. GK, p. 6), price control legislation (Ex. MU, p. 6) and housing legislation (Ex. MW, p. 6).

The People's World also campaigned for an amendment to the San Francisco city charter on the grounds that the charter as it stood permitted minority rule and was therefore undemocratic.[9] It supported wage increases for the transit workers on municipally owned street-car lines. (Ex. Js., p. 6.) It condemned police brutality, and Petitioner Richmond became a member of a committee which sought "to secure a statement of policy from Mayor Lapham and Police Chief Dullea that any infringement by a police officer of the civil liberties of Negro citizens and other members of minority groups will be cause for immediate dismissal from the force." (Exs. Ke., p. 3; Kf., p. 6.) It opposed some candidates in municipal elections and endorsed others. (Ex. Kh., Sec. 2.)

The People's World had very clear and definite views on both domestic and foreign affairs. At times these views were in accord with those generally held throughout the country. At other times these views were in sharp conflict with those prevailing. But at no time were these views ever consistent with the theory that the paper advocated any but peaceful means of change.

During the Second World War the paper urged that "the election of a U.S. senator and congressman to support the President, and the defeat of those California congressmen who have voted with the obstructionist bloc are all-important to assure a Congress which will not

[9] In connection with the San Francisco Charter campaign, the paper urged "All civic-minded citizens and organizations" to "turn out" at a hearing scheduled to consider Charter changes "and let the city officials know that they want majority rule to prevail in San Francisco". (Ex. JN, App. Item 82, pp. 333-34.)

sabotage the war effort and a democratic peace. This will be the test for all candidates regardless of party labels." (Ex. DP, App. Item 82, pp. 332-3.)

In post-war years it opposed dealing with and lending support to Francisco Franco, the "Fascist dictator" of Spain. (Ex. 159-a, App. Item 27, p. 145.) It urged recognition of and trade with China and opposed United States involvement in war over Formosa. (Ex. 159-a, App. Item 32, pp. 156-7.) It took the position that in order to maintain "the peace of the world" it was necessary to achieve "an accord between the United States and the Soviet Union."[10] It opposed American participation in the Korean War (Ex. Ef., p. 12), saying among other things: "President Truman has thrown our country into a hopeless military adventure." (Ex. Cj, p. 7.) It opposed the Marshall Plan, contending that aid to the people should be administered through the United Nations and that the Marshall Plan was being used to interfere in the internal affairs of the countries being given assistance. (Ex. Ka, p. 6.)

As to domestic issues, *The People's World* constantly expressed itself in favor of a policy of full equality for

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[10] (Ex. AQ, p. 6.) Thus an article written in 1947 by petitioner Richmond states:

> "Let it be understood and underscored: 'Peace in the world depends fundamentally on the cooperation of Soviet Russia and the United States, the two mightiest powers.' This is the beginning of all intelligent thought on the problem of war and peace. And intelligent thought on this most vital of problems is a more solemn tribute to the returning dead than all the bugle calls, all the salutes, all the florid oratory.
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> "There are some who say that friendship with Soviet Russia is impossible. The answer is: the serious effort has not been made." (Ex. FM, Sec. 2, p. 1.)

the Negro people.[11] The paper strongly supported the demands of organized labor for wage increases and improved working conditions. It called for an end to jurisdictional disputes and for the organization of the unorganized. (Ex. Jn, p. 6.) It advocated labor unity between the AFL and the CIO. (Ex. Kd, p. 6.)

In short, *The People's World* functioned as an organ of opinion covering the panorama of local, state, national and world affairs. Its columns dealt with the major controversial subjects of its time in expressions generally sharp and vigorous. Among the newspapers of our country it represented for the most part a tiny minority voice speaking against the status quo. Change it advocated, beyond any doubt. Equally sure is the fact that it advocated the use of peaceful and democratic methods to achieve such change.

REASONS FOR GRANTING A WRIT.

I.

Petitioners Richmond and Connelly hereby adopt by reference all reasons and arguments for the granting of a writ of certiorari set forth in the Yates petition.

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[11] One article in *The People's World* entitled "Criticism of miseducation in Negro history" advanced the thesis that the history of the Negro people has been misrepresented in many phases of our national life, particularly in motion pictures, and advocates an end to discrimination and segregation. (Ex. 710, p. 5.) The paper proposed the election of a "progressive Negro candidate" and "an end to the disgraceful situation in which Los Angeles has a lily-white City Council". (Ex. FA, p. 6.) It further advocated that segregation and discrimination in the armed forces be ended. (Ex. EJ, p. 6.) It welcomed a decision of the California Supreme Court which protected Negro workers against compulsory membership in Jim Crow unions. (Ex. GK, p. 6.)

II.

The Court of Appeals in deciding this case has misconstrued the decision of this court in *Dennis v. United States*, 341 U.S. 494, and in so doing has announced a principle under which unconstitutional limitations on press, speech and assembly would be and have been imposed.

The defendants in the *Dennis* case were indicted under Sections 2 and 3 of the Smith Act. The offense defined by Section 3 is one of conspiring to violate Section 2. Subsequent to the decision in *Dennis*, the Smith Act was amended and Section 3, the conspiracy provision, was deleted. The indictment in the instant case was made under 18 U.S.C. Section 371, a statute which makes it criminal to conspire to commit any offense against the United States. Petitioners were charged with conspiring to commit the offenses delineated in Section 2 of the Smith Act. Thus both these petitioners and defendants in the *Dennis* case were charged with conspiring to violate Section 2 of the Smith Act. In deciding the instant case, however, the Court of Appeals said:

> "The principles of freedom applied to speech, publication and assembly must be preserved. Under the instant indictment, there are implications which must be considered, but the impact is much less direct than in the Dennis case. As heretofore indicated, the charge here is of a substantive conspiracy to act with a definite objective where one overt act must be alleged. The teaching and advocacy of the duty and necessity of destruction of the government by force and violence, although criminal by substantive enactment, are here by the language of the

charge made subservient to the alleged purpose and object of organizing to advocate and teach with intent to destroy and overthrow as speedily as circumstances permit. The indictment in the Dennis case was entirely different." (Appendix A, p. 14.)

As the quote above shows, the Court of Appeals' decision is based on the assumption that an indictment founded on 18 U.S.C., Section 371, involves inherently less restraint on freedom of the press, speech and assembly than did the form of indictment in the *Dennis* case. This assumption, we think, is patently erroneous. Both indictments were the same in substance. What the Court of Appeals has said is that when a so-called "standard conspiracy" is charged, the problems are somehow basically different from those treated by this Court in the *Dennis* case: In particular, the Court says that the restraints upon the freedoms guaranteed by the First Amendment are somehow less drastic and therefore less to be considered in deciding the case. There is no apparent reason why this should be so. This Court was quite cognizant of the fact that a conspiracy was charged in *Dennis v. The United States*, yet the Court's opinion there and the concurring opinion of Justice Frankfurter treated as of first importance the problem whether the convictions were valid under the First Amendment.

Under the rule of the Court of Appeals here, First Amendment problems would be at best only of secondary importance. It is obvious that such an approach would allow for the imposition of far greater restraints on First Amendment freedoms than would be permissible under the approach which this Court adopted in *Dennis*.

Indeed, as is further discussed infra, the instant case is a striking illustration of such a happening. It is important that this Court review the decision below so that a definitive statement may be had as to the significance, if any, of the technical change in the form of the indictment brought about by the repeal of the conspiracy section of the Smith Act and the subsequent reliance upon Section 371 of Title 18 of the U.S.C.

Moreover, a consideration by this Court is the only way in which the erroneous principle enunciated by the Court of Appeals—that the First Amendment is less important when the indictment is under 18 U.S.C. 371—may be corrected. In this respect it is important to note that future indictments for conspiracy to violate the Smith Act must draw on 18 U.S.C. 371, and therefore that a consideration by this Court of the problems noted above would serve as a guidepost to the lower Courts in their handling of the problems which will inevitably arise.

III.

The Court of Appeals, in deciding this case, has passed upon an important question of the constitutional application of the Smith Act not heretofore considered by this Court.

Heretofore this Court has considered problems similar to the one presented in this case only in *Dennis v. United States*. The opinions in that case are careful to point out that the decision there is restricted to the factual situation there presented. The holding in *Dennis* was

simply that the Smith Act as so applied was constitutional. As to future cases, the Court's opinion stated:

> "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution."

We believe that the instant case is one which bears such marked dissimilarities to the *Dennis* case as to fall within the purview of the paragraph quoted above. The facts upon which the convictions were based in the *Dennis* case are strikingly different from the facts upon which the convictions here rest. In *Dennis* the defendants were the national leaders of the Communist Party, the very highest of officials. They were instrumental in the reconstruction of the Communist Political Association into the Communist Party. They were the chief organizers and directors.

Petitioners here are not national officials of the Party. Indeed, they were never shown to have been officials on any level.[12] They edited a Communist sponsored newspaper; they attended Party meetings and discussed the

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[12]In two Smith Act cases since *Dennis* the defendants have sought certiorari but have been unsuccessful. In both cases the facts were far stronger than those as to our petitioners. *Frankfeld v. United States*, 198 F.2d 679, cert. denied, 344 U.S. 922; The Court of Appeals says, at page 686, "The connection of the defendants with the conspiracy in which the Communist Party was engaged was also amply supported by the testimony. The case as to them was not one of mere membership in the party depending on 'guilt by association'. They were shown to be officers and teachers of the Party." *Flynn v. United States*, 216 F. 2d 354, cert. denied, 75 S. Ct. Rep. 295: "Defendants were national functionaries of the Communist Party. They were the so-called 'second string' national leadership."

newspaper; they sought to promote the circulation of that newspaper. In *Dennis* the defendants, as top level national leaders and officials of the Party, actually circulated and distributed the literature which the jury presumably concluded advocated violent overthrow of the Government. Petitioners here distributed a newspaper which contained no mention at any time of force and violence. Quite to the contrary, that newspaper, insofar as it advocated anything, advocated political action in the best traditions of our democratic heritage.

The practical result of the decision in the *Dennis* case was to prohibit those defendants, upon the proof there made, from circulating materials which advocated violent overthrow of the Government, organizing the Communist Party, and from being Party leaders and organizers. The net result of the decision of the Court of Appeals here is this: Participation in the legal and legitimate activities of the Communist Party is prohibited. Judge Frankfurter, concurring in the *Dennis* case, says:

> "A public interest is not wanting in granting freedom to speak their minds even to those who advocate the overthrow of the Government by force. For the evidence in this case abundantly illustrates coupled with such advocacy is criticism of defects in our society."

The decision below as to petitioners here is based on no showing whatsoever that they advocated violence but simply on their activities in legal parts of the Party's activities. We believe, that to hold, as the Courts below did hold, that the Smith Act can be constitutionally applied to such facts, presents a substantial question not pre-

sented—indeed reserved—in the *Dennis* case. The Court of Appeals, in affirming the conviction of petitioners, in effect holds that participation in any part of the Communist Party's program, even its legal programs, constitutes sufficient grounds for finding connection with a conspiracy to advocate revolution by force and violence, and sufficient evidence of an intent to bring about such a revolution as speedily as circumstances would permit. It is clear that such a holding imposes restraints upon areas of free speech, press and assembly not involved in the *Dennis* case. This Court should review this case to determine whether the Smith Act can be constitutionally applied, when to apply it results in such far reaching restraints.

IV.

The Courts below permitted an unconstitutional restraint upon freedom of press, speech and assembly by holding that the activities of petitioners proved at trial constitute an offense under the statutes here involved. This error, involving as it does a question as to the scope of the protection afforded by the First Amendment, presents a situation in which review by writ of certiorari is an appropriate remedy.

Petitioners were convicted of conspiring to violate Section 2 of the Smith Act, intending to bring about a forceful revolution as speedily as circumstances would permit. Assuming, for purposes of discussion, that a conspiracy to violate the Smith Act was shown to have existed, it

was further necessary in order to sustain petitioners' convictions to conclude that they had joined the conspiracy and that in joining they had the intent above referred to. The problem is whether it is violative of the First Amendment to permit such conclusions to be based solely on proof of such activities as petitioners were shown to have engaged in.

Petitioners were shown to be members of the Communist Party. This in itself cannot be a basis for criminal prosecution. The trial court so ruled (Inst. 11 K; App. Item 2 f. p. 31); respondent conceded this point below (Appellee's Br. p. 268); and the court below accepted this as a correct statement of the law. (Op. Appendix A, p. 11.) No direct showing was made that petitioners ever advocated violence or agreed to organize others for the purpose of so advocating. No direct showing was made that petitioners ever agreed with the other defendants herein as to anything. It was shown that petitioners and the other defendants discussed the publication, circulation, content, policies, etc., of *The People's World*, and this showing provides a basis for a conclusion that petitioners and the others did agree—"conspire"—as to such matters. However, if the gist of the agreement is to be gleaned from the action which presumably was agreed upon, then the evidence indicates quite clearly that there was no agreement to recommend the use of force to achieve governmental change. The newspaper which petitioners edited pursuant to the inferred agreement never advocated force or violence. It advocated voting, writing congressmen, support of strikes, and similar traditionally American activities. It approved ju-

dicial decisions in support of racial equality. It put forth minority views of vital issues of the day. Assuming that petitioners and other of the defendants conspired, the evidence shows quite clearly what they agreed that petitioners should do, and this was not advocating force and violence.

The evidence showed that petitioners did things in addition to editing, circulating, discussing, etc., the newspaper. They attended meetings of the Party. No showing was made that these meetings considered, not to mention advocated, unlawful conduct. Petitioners spoke at Party meetings. What they said, however, was such things as that strikes should be supported, or that "capitalists" are the enemies of the "workers". Petitioners agreed to support certain Party policies and decisions. Thus petitioner Connelly agreed to back the Party slate for the International Executive Board of the Newspaper Guild, and petitioner Richmond agreed that certain Party criticism of himself relating to chauvinism was correct and that he should attempt to correct this. Yes, petitioners were shown to have agreed to various things, but an agreement as to the advocacy of force or as to the use of the Communist Party to so advocate is conspicuous by its absence.

The Courts below held that the demonstrated activities of petitioners, outlined above, could constitute a conspiracy to violate Section 2 of the Smith Act, and this includes a specific intent to bring about a revolution as soon as possible. It is a proper function of this Court to decide whether that holding constitutes a correct interpretation of the applicable statutes, and, if correct, whether the

statutes as so interpreted and applied violate the First or Fifth Amendment.

In *Bridges v. Wixon*, 326 U.S. 135, this Court undertook to determine whether the proven activities of the petitioner constituted "affiliation" within the meaning of the statute there involved. The problem here is of much the same type. The courts below have held that certain activities of petitioners may constitute a "conspiracy" and also may suffice as proof of a certain specific mental intent. Certainly such an ultimate conclusion as "conspiracy" is one within the purview of this Court's reviewing power. *Baumgartner v. United States*, 322 U.S. 665, 671. The question as to whether established activities may form the basis for the conclusion that a certain intent existed is also a proper question for consideration by this Court. *Hartzel v. United States*, 322 U.S. 680. Considering the breadth of the restraints on speech, press and assembly which would be permissible were petitioners' activities here sufficient to constitute the elements of the charged offense, and considering the seeming arbitrariness of such a conclusion, we believe that Congress would never have intended that the statutes be so applied.

Assuming, however, that the Courts below properly construed and applied 18 U.S.C. 371 and 2385, the question arises whether such an application is constitutional. It seems clear that the restrictions on speech, assembly, and especially press thereby imposed are greater than any heretofore allowed. If the decision is to be measured by its practical consequences, then the holding might be described as follows: Any member of the Communist

Party who in any way participates in any phase of the Party's lawful political activities—discussions, gatherings, newspaper activities—may be properly held to have conspired to advocate violent overthrow of the Government, intending to cause such overthrow as quickly as feasible. If, as the Court said in *Near v. Minnesota*, 283 U.S. 697, 708, statutes such as these "must be tested by (their) operations and effect," then it seems clear that the application made by the Courts below is in violation of the First Amendment. A restraint is imposed upon speech, press and assembly, all lawful in themselves, simply because these activities are conducted under the auspices of the Communist Party. A similar result has been previously condemned by this Court. *DeJonge v. Oregon*, 299 U.S. 353.

It is of paramount importance to constitutional government that the enlarged restraints upon the First Amendment applied below should not survive.

CONCLUSION.

Your petitioners respectfully submit that for the reasons above stated a petition for writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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